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6 Attorneys for Plaintiff
7 ACTUATE CORPORATION

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN FRANCISCO DIVISION

11 ACTUATE CORPORATION, a Delaware
corporation,

12 Plaintiff,

13 v.

14 WASHINGTON MUTUAL BANK, a
15 Washington corporation,

16 Defendant.
17

CV 08

CASE NO.:

2918

**COMPLAINT FOR BREACH OF
CONTRACT AND COPYRIGHT
INFRINGEMENT**

JURY TRIAL DEMANDED

18
19 Plaintiff Actuate Corporation ("Actuate") brings this civil action against Washington
20 Mutual Bank ("Defendant") and for its complaint alleges as follows:

21 **PARTIES**

22 1. Actuate is a corporation incorporated in the state of Delaware with its
23 headquarters at 2207 Bridgepointe Parkway, Suite 500, San Mateo, California. Actuate was
24 formerly located at 701 Gateway Boulevard, South San Francisco, California.

25 2. Actuate is informed and believes that Washington Mutual Bank is a subsidiary of
26 Washington Mutual, Inc. and is a corporation that is, and at all relevant times has been,
27 incorporated in the state of Washington with its headquarters at 1301 Second Avenue, Seattle,
28 Washington.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this Complaint pursuant to 28 U.S.C. §§ 1331 and 1367. Actuate's copyright infringement claim presents a federal question and its breach of contract claim is part of the same case and controversy. Jurisdiction would also be proper pursuant to 28 U.S.C. § 1332, as the matter in controversy is between citizens of different states, and the amount in controversy exceeds the value \$75,000, exclusive of interest and costs.

4. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1). Defendant, a bank, operates branches in this district and is therefore subject to personal jurisdiction in this District.

GENERAL ALLEGATIONS

5. Actuate develops computer software and sells licenses to that software, almost exclusively to large "enterprise" businesses.

6. Actuate holds all right, title and interest in federally-registered United States copyrights covering its Actuate 8.0 software (and earlier versions thereof), including the following copyrights: TX0006348889; TX0006348888; TX0006348887; TX0006348886; TX0006348885; TX0006348884; TX0006348883; TX0006348882; TX0006348881; TX0006348880; TX0006348879; TX0006348878; TX0006348877; TX0006348876; TX0006348875; TX0006348874; TX0006348873; TX0006348872; TX0006348871; and TX0006348870.

7. The Actuate iServer, eReport Option, eSpreadsheet Option and Actuate Developer Packs are modules included within the Actuate 8.0 software covered by Actuate's aforementioned copyrights.

8. Defendant has licensed software from Actuate since 2001.

9. On October 13, 2003, Actuate received by facsimile from Defendant a signed Purchase Authorization Letter ("PAL") through which Defendant agreed to purchase from Actuate licenses to Actuate's iServer with eReport Option, eSpreadsheet Option and Developer Pack software ("the Actuate Software"). The PAL is attached hereto as Exhibit A.

10. The PAL states: "The Buyer does not use [a] purchase order form and this letter servers as a purchase order."

11. Under the terms of the PAL, Defendant's license entitled:

- 100 "Named Users" to use "iServer w/eReport Option" in a "Production Environment"
- 25 "Named Users" to use "eSpreadsheet Option" in a "Production Environment"
- 100 "Named Users" to use "iServer w/eReport Option" for "Testing Use Only"
- 25 "Named Users" to use "eSpreadsheet Option" for "Testing Use Only"
- 1 Named Developer to use a "Developer Pack" for "Development Environment Use Only"

12. The PAL defined "Named User" as follows:

A Named User shall mean an individual person who receives any content generated by the Actuate iServer. The individual may be authorized to access the iServer to view reports and/or information content that is managed by the iServer, they may receive content via e-mail, or they may receive printed content generated by the iServer. A Named User license allows only a specific number of Named Users to access the iServer or view reports/information content generated by the iServer. No other users are licensed to access the server or view reports/information content generated by the server at any time. Each Named User License block comprises a specified number of named user licenses and is available in block increments only. Named User licensing is charged on a *per user, per iServer System* (an iServer System is a stand-alone or clustered iServer). Thus, each individual person must have a separate Named User license for each iServer being accessed or from which any content is received. If Licensee is using Actuate Multi-Application Option or Online Archive Option, a separate Named User license is required for each additional Encyclopedia Volume (i.e.; application) that an individual person accesses or receives content from within an iServer System.

13. The PAL defined "Named Developer" as follows:

Named Developer License Software is charged on a *per developer* basis, and thus each license may be accessed or used for development purposes by only a single, identified developer. Such developer may use an individual iServer for development or access a common development iServer; provided, however, that each individual developer accessing an iServer must have a separate Named Developer License.

1 14. Actuate provided Defendant with copies of the Actuate Software. A click-wrap
2 license agreement was included with the Actuate Software provided to Defendant. Defendant
3 manifested its consent to the click-wrap license as part of the installation process for the Actuate
4 Software. The click-wrap license agreement contains definitions for "Named User" and "Named
5 Developer" that are substantively identical to the definitions of those terms contained in the
6 PLA. A copy of the click-wrap license agreement is attached hereto as Exhibit B.

7 15. Defendant never asked Actuate to re-negotiate the PAL or the click-wrap license
8 agreement.

9 16. Between the date the PAL was signed and mid-2007, Defendant contacted
10 Actuate on multiple occasions to verify the existence and scope of its licenses to the Actuate
11 Software. In response to those requests, Actuate reiterated the information contained in
12 paragraphs 11-12 above. Defendant never asked Actuate to renegotiate the PAL or the click-
13 wrap license agreement.

14 17. In early 2008, Defendant asked Actuate to perform a service call relating to
15 Defendant's Actuate Software. During that service call, Actuate discovered that Defendant's use
16 of the Actuate Software far exceeded the use to which Defendant was entitled under its license
17 with Actuate.

18 18. Actuate is informed and believes that Defendant has been allowing hundreds of
19 people to access the Actuate Software and has been providing tens of thousands of people with
20 reports and/or information content managed or generated by the Actuate Software.

21 19. Under the definition of Named User in the PAL and the click-wrap license
22 agreement, all of those persons are Named Users whose use of the Actuate Software must be
23 licensed and paid for.

24
25 //

FIRST CAUSE OF ACTION

(Breach of Contract)

20. Actuate realleges and incorporates by reference paragraphs 1 through 19 above as though fully set forth herein.

21. The PAL and click-wrap license agreement, individually and together (referred to collectively as the "License Agreement"), constitute a writing to which Defendant was a party and through which Actuate provided Defendant with a limited license to use the Actuate Software.

22. Actuate fulfilled all of its obligations under the License Agreement that were not excused by Defendant's actions.

23. One of the limitations contained in the License Agreement is that Defendant may only authorize up to 125 persons to access the Actuate Software or reports and/or information content generated or managed by the Actuate Software in a "production environment."

24. Actuate is informed and believes that Defendant exceeded the scope of, breached, and continues to breach, the terms of the License Agreement by: (1) allowing more than the permitted number of people authorized access to, and to access, the Actuate Software; and/or (2) providing more than the permitted number of people with reports and/or information content generated or managed by the Actuate Software.

25. Actuate is informed and believes that Defendant has allowed hundreds of people to access the Actuate Software and has provided tens of thousands of people with reports and/or information content generated or managed by the Actuate Software.

26. Actuate has been harmed by Defendant's ongoing breach of the License Agreement and is entitled to both injunctive relief and monetary damages in an amount to be determined at trial, but not less than ten million dollars (\$10,000,000) exclusive of attorneys' fees and costs.

//

SECOND CAUSE OF ACTION

(Copyright Infringement)

27. Actuate realleges and incorporates by reference paragraphs 1 through 26 above as though fully set forth herein.

28. Actuate owns valid and enforceable registered U.S. copyrights covering the Actuate Software.

29. Actuate is informed and believes that Defendant, its employees, and its agents copied and/or used copies of the Actuate Software in violation of the License Agreement. Actuate is informed and believes that Defendant's use of the Actuate Software exceeds the scope of licensed use permitted by the License Agreement.

30. Defendant's unlicensed use and copying of the Actuate Software constitutes infringement of Actuate's registered copyrights covering the Actuate Software pursuant to 17 U.S.C. § 106.

31. Actuate is informed and believes that Defendant's past and ongoing infringement was knowing and willful.

32. In light of Defendant's ongoing knowing and willful infringement of Actuate's copyrights, Actuate is entitled to injunctive relief pursuant to 17 U.S.C. § 502 as well as its actual damages suffered as a result of the infringement and any profits of Defendant that are attributable to the infringement and not taken into account in computing actual damages, pursuant to 17 U.S.C. § 504. The amount of damages to which Actuate is entitled is to be determined at trial, but is not less than ten million dollars (\$10,000,000).

PRAYER

WHEREFORE, Actuate prays for judgment against Defendant as follows:

1. An injunction barring Defendant from (i) accessing or providing access to the Actuate Software and/or (ii) producing, providing to others, or otherwise using reports and/or information content generated or managed by the Actuate Software;

2. Actual damages of not less than ten million dollars (\$10,000,000), including a disgorgement of Defendant's profits from its infringement;
3. Costs of suit and attorneys' fees, pursuant to 17 U.S.C. § 505; and
4. Such other relief as may be deemed just.

Dated: June 11, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: 

Brian G. Mendonca

Attorneys for Plaintiff
ACTUATE CORPORATION

JURY TRIAL DEMAND

Plaintiff Actuate Corporation respectfully demands a trial by jury on all claims.

Dated: June 11, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: 

Brian G. Mendonca

Attorneys for Plaintiff
ACTUATE CORPORATION

EXHIBIT A

10-15-04

11:47am

From:WAMU

+2064907019

T-667

P-002/003

F-774



PURCHASE AUTHORIZATION LETTER

This purchase authorization letter is issued to Actuate Corporation (the "Seller") at:

701 Gateway Blvd.
South San Francisco, CA 94080
Phone: 650-837-2000
Fax: 650-837-1560

by Washington Mutual, (the "Buyer").

Order date: October 13, 2004 _____

Purchase Order No. _____
(if applicable)

Purchase Order Information

This letter serves as the Buyer's purchase order and stands as a firm commitment of the Buyer to purchase the products listed below. This authorization letter shall not delay and/or effect any payment that may be due from this purchase commitment or subsequent purchase order. This letter authorizes Seller to ship and invoice the Buyer for the products and services listed below. Actuate and Buyer agree to negotiate a master software license agreement in good faith, within 30 days of the Order Date, which agreement will govern licensing terms for future orders of Actuate software.

Please check one:

- ☒ The Buyer does not use purchase order form and this letter serves as a purchase order.
☐ The Buyer does use purchase order form. The P.O.# is _____ A hard copy will be sent to the Seller within seven (7) business days from the Order Date.

License Information

Actuate Corporation Software License Agreement governs the licensing of the Products listed below.

Bill To (address and phone #):

Washington Mutual bank
Attn: TSG Accounting Operations
1111 3rd Ave - Mailstop BBT2520
Seattle, WA 98101
Phone: 206.461.8977

Ship To (address and phone #):

Bill Porter
Washington Mutual Bank
1215 4th Ave - Mailstop FCB0812
Seattle, WA 98161
Phone: 206.461.8977

Products Ordered:

Description	Quantity	Total
<i>Production Environment</i>		
iServer w/eReport Option - licensed by Named User	100	\$50,000
eSpreadsheet Option - licensed by Named User	25	\$18,750
Subtotal Production Environment		\$68,750
<i>For Testing Use Only</i>		
iServer w/eReport Option - licensed by Named User	100	\$15,000
eSpreadsheet Option - licensed by Named User	25	\$5,625
Subtotal Testing Environment		\$20,625
<i>Development Environment Use Only</i>		
Developer Pack - licensed by Named Developer	1	\$15,000
1 st Year Standard Maintenance Services	1 year	\$20,875
TOTAL		\$125,250*

*Offer expires on October 29, 2004.

10-15-04

11:47am

From:WAMU

+2064907019

T-667

P.003/003

F-774



If Buyer elects to renew the Maintenance Services ordered hereunder, the applicable rates for the second year of service will be \$20,875. If Buyer elects to renew the Maintenance Services ordered hereunder, the applicable rates for the third and fourth years will not increase by more than 5% from the fees paid the previous year.

A Named User shall mean an individual person who receives any content generated by the Actuate iServer. The individual may be authorized to access the iServer to view reports and/or information content that is managed by the iServer, they may receive content via email, or they may receive printed content generated by the iServer. A Named User license allows only a specific number of Named Users to access the iServer or view reports/information content generated by the iServer. No other users are licensed to access the server or view reports/information content generated by the server at any time. Each Named User License block comprises a specified number of named user licenses and is available in block increments only. Named User licensing is charged on a *per user, per iServer System* (an iServer System is a stand-alone or clustered iServer). Thus, each individual person must have a separate Named User license for each iServer being accessed or from which any content is received. If Licensee is using Actuate Multi-Application Option or Online Archive Option, a separate Named User license is required for each additional Encyclopedia Volume (i.e., application) that an individual person accesses or receives content from within an iServer System.

Named Developer License Software is charged on a *per developer* basis, and thus each license may be accessed or used for development purposes by only a single, identified developer. Such developer may use an individual iServer for development or access a common development iServer; provided, however, that each individual developer accessing an iServer must have a separate Named Developer License.

Named User licenses may be reused when a prior Named User terminates employment, changes job functions or otherwise ceases to use content generated by the Actuate iServer in the normal course of their job.

Terms:

Payment terms: net 30 days

Ship via: FOB origin

Taxable: Yes X

No

If No, Exemption certif. #:

Authorized Buyer:

Approved by: Angela Veksler

Date: October 13, 2004

Print name: Angela Veksler

Title: Senior Vice President

Technology Solutions Group

EXHIBIT B

Software License Agreement For Actuate® Software

ATTENTION: PLEASE READ THIS AGREEMENT CAREFULLY BEFORE YOU INSTALL, COPY, DOWNLOAD OR USE THE SOFTWARE ACCOMPANYING THIS PACKAGE.

This Software License Agreement "SLA" is a legal agreement between "You" (the individual or entity) who acquired the Actuate software products and printed and/or electronic documentation and software license key(s) accompanying this SLA "Software," and Actuate Corporation and its subsidiaries, "Actuate." By installing, copying, downloading or using the Software, You agree to be bound by the terms of this SLA. If You do not agree with the terms of this SLA, Actuate is unwilling to license the Software to You. In such event, You may not install, copy, download or use the Software and You must return to Actuate the complete Software package, including the disks and printed materials or if you downloaded the Software notify Actuate in writing that You have de-installed the Software, within thirty (30) days of receipt for a full refund, otherwise You will be obligated to pay Actuate the purchase price of the Software.

1. LICENSE.

- 1.01 **Grant.** Subject to the terms and conditions of this SLA, Actuate hereby grants to You a non-exclusive, non-transferable license to use the Software for internal business purposes and only on the authorized number of CPUs and/or only by the authorized number of Named Users and only for the authorized use for which You have paid Actuate a license fee. You may not install the Software outside of the country to which the Software was initially shipped. Once installed, You must notify Actuate in writing if You move any server Software products from any CPU or server to another CPU or server. Such notice shall include (i) the CPU identification and server name of all CPUs and servers involved in such a move and (ii) any other information reasonably requested by Actuate. Actuate may withhold Software license key(s) if, in Actuate's reasonable opinion, You are using the Software in an unauthorized manner.
- 1.02 **Term.** The license granted hereby begins upon installation, copying, downloading or use of the Software and continues in perpetuity unless sooner terminated.
- 1.03 **No Copies.** Except as expressly allowed by the terms of this license, You shall not copy or modify any portion of the Software other than that You may make one (1) copy of the computer program portion of the Software solely for archival purposes.
- 1.04 **Other Limitations.** You shall not rent, lease, loan, sell or otherwise distribute the Software or use the Software as an application service provider, as a service bureau, or in a fee-generating service provided to third parties. You shall not reverse engineer, decompile or otherwise attempt to derive the source code for the Software.
- 1.05 **Limited Use License.** If You acquired the Software from a Third Party and the Software was embedded or bundled with a "Third-Party Software Application," You are only granted a "Limited Use" license for the Software. See Section 8 of this SLA for an explanation of Limited Use rights.
- 1.06 **CPU License.** With respect to any Software licensed by You, which is designated as "CPU License" Software, You agree to configure the Actuate application(s) so that such application(s) can only access the number of CPUs that are licensed. You further agree that every CPU on the reporting server environment, including, but not limited to, remote clustered nodes that are configured to run Actuate server products must be licensed.
- 1.07 **Named User License.** With respect to any Software licensed by You, which is designated as "Named User License" Software and thereby limited to a specified number of named individual users, the following shall apply, and You agree to use such Software only in accordance with the following restrictions:

A Named User is an individual person who receives any content generated by the Actuate iServer. The individual may be authorized to access the iServer to view reports and/or information content that is managed by the iServer, they may receive content via email, or they may receive printed content generated by the iServer. A Named User license allows only a specific number of Named Users to access the iServer or view reports/information content generated by the iServer. No other users are licensed to access the server or view reports/information content generated by the server at any time. Each Named User License block comprises a specified number of named user licenses and is available in block increments only. Named User licensing is charged on a per user, per iServer System

June 10, 2004



(an iServer System is a stand-alone or clustered iServer). Thus, each individual person must have a separate Named User license for each iServer being accessed or from which any content is received. If You are using Actuate Multi-Application Option or Online Archive Option, a separate Named User license is required for each additional Encyclopedia Volume (i.e., application) that an individual person accesses or receives content from within an iServer System.

- 1.08 **Named Developer License.** With respect to any Software licensed by You, which is designated as "Named Developer License" Software, the following shall apply and You agree to use such Software only in accordance with the following restrictions:

Named Developer License Software is charged on a *per developer* basis, and thus each license may be accessed or used for development purposes by only a single, identified developer. Such developer may use an individual iServer for development or access a common development iServer; provided, however, that each individual developer accessing an iServer must have a separate Named Developer License.

2. CONFIDENTIALITY; OWNERSHIP.

- 2.01 **Title.** Title to the Software is reserved to Actuate. You acknowledge and agree that Actuate is and will remain the owner of the Software.
- 2.02 **Proprietary Information.** You agree that the Software and all computer code, inventions, algorithms, know-how and ideas embodied in or by the Software and all other business, technical and financial information You obtain from Actuate, whether designated confidential or not (hereinafter referred to as "Proprietary Information") are the confidential property of Actuate. You also agree that any expression of Actuate's findings, analyses, conclusions, opinions, recommendations, ideas, techniques, know-how, designs, programs, enhancements, software, and other technical information provided to You by Actuate in the course of performing consulting, training, maintenance or other services related to the Software are the Proprietary Information of Actuate and are licensed to You, without further license fees, pursuant to this SLA.
- 2.03 **Non-Disclosure.** You agree to keep the Proprietary Information in a secure place, under access and use restrictions designed to prevent disclosure of the Proprietary Information to unauthorized persons and to instruct Your personnel to keep the Proprietary Information confidential.
- 2.04 **Breach.** You agree that any disclosure of the Proprietary Information to a Third Party other than in accordance with the terms of this SLA constitutes a material breach of this SLA and will terminate the license granted by this SLA.
- 2.05 **Injunctive Relief.** You further agree that You will be liable for all damages to Actuate that result from any wrongful disclosure of the Proprietary Information to any Third Party or any breach of this SLA. You acknowledge that such wrongful disclosure or breach could cause irreparable injury that cannot be compensated by monetary damages and that injunctive or other equitable relief may be appropriate.

3. MAINTENANCE AND SUPPORT.

Only Actuate or an Actuate authorized distributor is authorized to perform maintenance and support of the Software, and such service will be performed solely in accordance with a written agreement or purchase order therefore. Actuate or its authorized distributor shall have no obligation to provide support or maintenance or updates, modifications or new releases, except as may be set forth in that agreement or purchase order. No maintenance or support obligation of Actuate or its authorized distributor shall survive termination of this SLA.

4. WARRANTIES AND LIMITATIONS OF LIABILITY.

- 4.01 **Software Media Warranty.** Actuate warrants that the medium on which the Software is delivered will be free from defects in workmanship and materials under normal use for a period of ninety (90) days after delivery of the Software, and that the medium will be repaired or replaced, at Actuate's option, upon return of said defective medium to Actuate within said ninety (90) day period.
- 4.02 **Software Warranty.** Actuate warrants that for a period of ninety (90) days from the initial delivery of the Software, the Software, if properly used by You in accordance with the Documentation, shall operate in material conformity with the Documentation for such Software. Actuate does not warrant that the Software will meet all of Your requirements or that the use of the Software will be uninterrupted or error free. Actuate's entire liability, and Your exclusive remedy, under this limited Software Warranty shall be for Actuate (i) to attempt, through reasonable

efforts, to correct any reproducible material nonconformity discovered within the 90-day warranty period, or (ii) to replace the nonconforming Software. In the event Actuate is unable to cure the breach of warranty described in this Section 4.02 after attempting the remedies described in (i) and (ii) above, You may return the Software and Actuate shall refund any fees paid by You for the Software. The above remedies are available only if Actuate is promptly notified in writing, within the warranty period, upon discovery of the nonconformity by You and if Actuate's examination of the Software discloses that such nonconformity exists and that the Software has not been (i) altered or modified, (ii) subjected to negligence, or computer or electrical malfunction, or (iii) used, adjusted, or installed other than in accordance with the instructions set forth in the Documentation.

4.03 **Disclaimer.** THE EXPRESS WARRANTIES SET FORTH IN SECTIONS 4.01 AND 4.02 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY WITH RESPECT TO THE SOFTWARE, AND ACTUATE EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF NONINFRINGEMENT OF THIRD PARTY RIGHTS, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

4.04 **Limitation of Liability.** YOU AGREE THAT YOUR EXCLUSIVE REMEDIES, AND ACTUATE'S ENTIRE LIABILITY WITH RESPECT TO THE SOFTWARE OR SERVICES PERFORMED BY ACTUATE THAT RELATE TO THE SOFTWARE, SHALL BE AS SET FORTH HEREIN. YOU FURTHER AGREE THAT ACTUATE WILL NOT BE LIABLE TO YOU FOR ANY DAMAGES, WHETHER SPECIAL, INDIRECT OR CONSEQUENTIAL, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOSS OF DATA, OR PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES ARISING OUT OF YOUR USE OR INABILITY TO USE THE SOFTWARE, OR THE PERFORMANCE OF ANY SERVICES RELATING TO THE SOFTWARE, EVEN IF ACTUATE HAS BEEN ADVISED OF THE POSSIBILITY OF THOSE DAMAGES. IN NO EVENT SHALL ACTUATE'S LIABILITY ARISING OUT OF THIS SLA EXCEED THE AMOUNT PAID BY YOU FOR THE SOFTWARE.

5. TERMINATION.

5.01 **Basis for Termination.** Actuate may terminate this SLA if You commit a material breach of this SLA and such breach is not cured within thirty (30) days of receipt of a written notice of such breach.

5.02 **Obligations Upon Termination.** Upon termination of this SLA, You will immediately destroy or return to Actuate all Software and Proprietary Information in Your possession.

5.03 **Effect of Termination.** The following provisions shall survive termination of this SLA: 2, 4, 5.02, 5.03, and 6.

6. GENERAL TERMS AND CONDITIONS.

6.01 **Severability.** If any provision of this SLA is found by any court of competent jurisdiction to be invalid, then the remaining provisions shall nevertheless remain in full force and effect.

6.02 **Shipping and Payment Terms.** All shipments of Software will be made F.O.B. Origin. Actuate's latest release of the Software documentation will be made available online at www.actuate.com and printed documentation will be shipped at Actuate's discretion. Upon shipment of Software, Actuate will invoice you for such Software. You will remit payment for invoices within thirty (30) days following receipt thereof. All fees will be nonrefundable except as otherwise expressly provided herein.

6.03 **Taxes.** You shall be responsible for and pay all sales, use, and excise taxes, and like charges imposed by any federal, state, or local governmental entity for Software provided hereunder, excluding only taxes based solely on Actuate's net income. When Actuate has the legal obligation to collect such taxes, the appropriate amount shall be due upon invoice to You unless You provide Actuate with a valid tax exemption certificate authorized by the appropriate taxing authority. You shall hold Actuate harmless from all claims and liability arising from Your failure to pay any such taxes, duties or charges.

6.04 **Choice of Law and Venue.** This SLA shall be governed by and construed under the laws of the State of California without regard to conflicts of laws or provisions thereof, and without regard to the United Nations Convention on Contracts for the International Sale of Goods. You agree that the federal and state courts within San Mateo County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of this SLA.

6.05 **Complete Agreement.** You acknowledge and agree that this SLA is the complete and exclusive statement of the mutual understanding of the parties and that it supersedes and cancels all previous written and oral agreements and communications relating to the subject matter of this SLA. Actuate disclaims all preprinted terms of any purchase order.

- 6.06 **No Modification.** You agree that this SLA can be modified only by a written agreement duly executed by persons authorized to execute agreements on behalf of the parties hereto. No modification can be accomplished by course of conduct.
- 6.07 **No Waiver.** You agree that any failure or delay to exercise or any partial exercise of any right, power, or privilege hereunder by Actuate shall not operate as a waiver.
- 6.08 **Attorneys' Fees.** If any legal action is necessary to enforce the terms of this SLA, the prevailing party shall be entitled to reasonable attorneys' fees and costs in addition to any other relief to which that party may be entitled.
- 6.09 **Export Laws.** You shall comply with all then current export laws and regulations of the U.S. Government and the government of the country in which You receive delivery of the Software, which pertain to the Software.
- 6.10 **Audit.** Upon reasonable notice to You, You agree to permit Actuate or its designated Third Party to conduct an audit of Your computer systems to ensure that You are not using more Software than You are licensed to use pursuant to this SLA. If the audit determines that you are out of compliance with this SLA, You shall promptly pay for such Software at the then current price upon receipt of an invoice from Actuate.
- 6.11 **Publicity.** You agree that Actuate can publicly identify You as an Actuate customer. You agree that Actuate can use, among other things, Your name and descriptions of Your use or intended use of the Software in Actuate press releases, web sites and marketing materials and that Actuate does not need Your prior approval to publish such materials.

7. U.S. GOVERNMENT RESTRICTED RIGHTS.

The Software, including related documentation, is provided with Restricted Rights. The use, duplication or disclosure by the U.S. Government is subject to restrictions as set forth in this SLA, and in the applicable provisions of subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause DFARS 252.227-7013, or subparagraphs (c)(1) and (2) of the Commercial Computer Software - Restricted Rights at 48 CFR 52.227-19. The manufacturer is Actuate Corporation, 701 Gateway Boulevard, South San Francisco, California 94080.

8. LIMITED USE LICENSE FOR ACTUATE SOFTWARE.

If You acquired the Software from a Third Party and the Software was embedded or bundled with a Third-Party Software Application, then the Actuate Software contained herein is being licensed to You only for "Limited Use" with the "Third-Party Software Application" with which the Actuate Software was embedded or bundled. Limited Use means that You may use the Actuate Software only in connection with Your contemporaneous use of such Third-Party Software Application and with data solely generated by such Third-Party Software Application. Limited Use does not include use of the Actuate Software in a stand-alone fashion or with software or data not incorporated into or solely generated by the Third-Party Software Application.

By installing, copying, downloading or using the Actuate Software, You agree to be bound by the terms of this Limited Use License.

If You are unsure whether You are restricted to Limited Use of the Actuate Software or You are interested in purchasing a Full Use License for Actuate Software, contact Actuate at 1-800-914-2259 or visit Actuate's web site at www.actuate.com.

JS 44 (Rev. 12/07) (cand rev 1-16-08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

Actuate Corporation

E-filing

DEFENDANTS

Washington Mutual Bank

(b) County of Residence of First Listed Plaintiff San Mateo, California
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

WILSON SONSINI GOODRICH & ROSATI
ONE MARKET, SPEAR TOWER, SUITE 3300
SAN FRANCISCO, CA 94105
(415) 947-2000

County of Residence of First Listed Defendant King, State of Washington
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- (For Diversity Cases Only)
- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury—Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input checked="" type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	PERSONAL PROPERTY	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	LABOR	SOCIAL SECURITY	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence		<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	Habeas Corpus:	IMMIGRATION	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 462 Naturalization Application		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 463 Habeas Corpus—Alien Detainee		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities—Employment	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 465 Other Immigration Actions		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities—Other	<input type="checkbox"/> 550 Civil Rights			<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

17 U.S.C. 501, et seq.

Brief description of cause:

Breach of contract and copyright infringement

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 10,000,000

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND☐ SAN JOSE

DATE

6/11/08

SIGNATURE OF ATTORNEY OF RECORD

